U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, D.C. 20001-8002

Date: October 14, 1998
Case No. **97 INA 317**

In the Matter of:

BERGQUIST QUARTER HORSES, *Employer,*

on behalf of

FELICIANO RODRIGUEZ-ORTEGA, *Alien.*

Appearance: N. B. Elkind, Esq., Denver, Colorado, for Employer and Alien

Before : Huddleston, Lawson, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf OF FELICIANO RODRIGUEZ-ORTEGA ("Alien") by BERGQUIST QUARTER HORSES ("Employer") under § 212(a)(5) (A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a) (5)(A) ("the Act") and the regulations promulgated thereunder, 20 CFR Part 656.[1] After the Certifying Officer ("CO") of the U.S. Department of Labor at Denver, Coloado, denied the application, the Employer requested review pursuant to 20 CFR § 656.26.

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States to perform either skilled or unskilled labor may receive a visa, if the Secretary of Labor has decided and has certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c). Administrative notice is taken of the *Dictionary of Occupational Titles*, published by the Employment and Training Administration of the U. S. Department of Labor.

demonstrate that the requirements of 20 CFR, Part 656 have been met. The requirements include the responsibility of an Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the State Employment Security Service ("SESA") and by other reasonable means to make a good faith test of U.S. worker availability.

STATEMENT OF THE CASE

On August 7, 1995, the Employer applied for alien labor certification on behalf of the Alien for the position of Assistant Trainer in its Quarter Show Horse Training business. Employer described the Job to Be Performed as follows:

> For business that raises and trains quarter horses, handle young colts to get them accustomed to being around people; halter-break very young colts to lead quietly; trim the feet of young colts; break two-year-old colts to the saddle; teach them to go quietly at a walk, trot, and lope; bit up young horses to teach them to be supple and give at the pole; teach colts to be soft in their face and neck and to bend. Also responsible for grooming and physical conditioning of horses. Responsible for worming and inoculating horses.

AF 03.[2] On the basis of the Employer's description, the job was classified as "Horse Trainer" under DOT Occupational Code No. 419.224-010. The SESA reported that it referred eleven U. S. workers for the job and that seventeen resumes were received. No U. S. worker was hired for the position, however. AF 02.

Notice of Findings. On August 28, 1996, the CO issued a Notice of Findings ("NOF") advising that certification would be denied, subject to Employer's Rebuttal. AF 87-91. (1) Explaining that under 20 CFR § 656.20(c)(8) the position described at box 15 in Form ETA 750A must clearly be open to any qualified U. S. worker, the CO explained that the Alien's work experience matched verbatim the job duties described in the application, and that the Alien admittedly had worked for the Employer in the Job Offered from May 1992 to the date of application without a visa authorizing such employment.[3] Subject to the rebuttal evidence, the CO found that a reasonable doubt existed as to whether the job Employer offered was a *bona fide* opening to which a U. S. worker might successfully be referred, interviewed and hired. (2) Based on 20 CFR §§ 656.20(c)(8), 656.21(b)(6), and 656.24(b)(ii), the CO said the Employer rejected seventeen applicants on grounds that they lacked two years of experience as an Assistant Horse Trainer. Relying on the education and experience described in the resumes of the applicants Farris, Halsey, Holloway, Lowe, Schranz, Schlichting, and Wolfe, the CO found that the evidence of record indicated that these U. S. workers apparently were qualified to perform the job duties

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[2]The wage offered was $1,200, per month for a fifty hour week from 7:00 AM to 6:00 PM, with no overtime. While the rate of pay included housing, the application did not indicate that this was a "live-in" job. Although no formal education was specified, the Employer required two years in the Job Offered.

[3] The CO inferred from box 3 in Form EAT 750 A and box 3 in Form ETA 750 B that the Alien worked for the Employer from May 1992 to the date of application as an undocumented worker.

described in Employer's application and should have been interviewed for the position. (3) Subject to rebuttal, the CO cited 20 CFR § 656.21(b)(2) and found that the Employer's hiring criteria were not those normally required for the occupation in the United States and defined for the job in the DOT. The CO explained that because the DOT description of a Horse Trainer made no reference to "worming and inoculting horses" this job requirement was unduly restrictive. (4) Citing 20 CFR § 656.21(b)(5), the CO said the evidence indicated that the Employer had hired the Alien without the experience it required of the U. S. job seekers who applied for this position. In the absence of evidence to the contrary, it was inferred that from the application that the Alien did not have the required experience when Employer hired him in 1992. The CO then specified the evidence necessary to rebut the findings set out in the NOF.

Rebuttal. On October 16, 1996, the Employer filed its rebuttal addressing the issues discussed in the NOF. AF 94-137. The rebuttal included a brief, a statement by Employer's principal, and various exhibits supporting Employer's assertions. Discussing the nature and extent of the hiring criteria, the Employer contended that the duties of the Assistant Trainer had become more complex because of the expansion of this operation, that the qualifications required in this application had not previously been demanded of any person hired for this position in the past, and that the Alien was the first person he had hired with the job skills he now required. Second, on recontacting the named U. S. workers the Employer did not find any of them to be qualified or available after interviews and further inquiry, as directed.
The Employer then said that his previous Assistant Trainers had cleaned the stalls and exercised the horses. He either hired "outside people" to trim the horses' feet, inoculate and worm the horses, and train the colts, or he did it himself. The Employer's documentary evidence confirmed that it would be "very beneficial" if an Assistant Trainer could administer the worming and routine injections in medical treatments for the animals, however, as "it would be 'cost-prohibitive' to call a veterinarian" to perform such procedures. Its principal admitted that he had never hired anyone in the position described in the application who had less training or experience that it the application now required. Finally, Employer asserted that the Alien's work for a Mexican racetrack, which was not documented for the various reasons its brief discussed, was comparable to the job duties in the application and that the
training the Alien received at that time was sufficient even though he was only seventeen years old at the time.

Final Determination. The CO issued a Final Determination denying certification on March 3, 1997. AF 138-140. Noting that the current Employment of the Alien in the job at issue raised a question as to whether the Employer would be willing to replace the undocumented Alien with a qualified U. S. worker, the CO found that the Employer had admitted that it had not previously employed a worker to perform the duties described in the application and that the duties performed by its prior employees in this position were different from the duties currently required of the Assistant Trainer. The CO rejected the rebuttal as proof that a job opportunity existed that clearly was open to U. S. workers. To the contrary, said the CO, the rebuttal inconsistently indicated that the Alien was performing the job duties as an assistant trainer at the

same time as other workers who were named in the Rebuttal were also working as assistant trainers for the Employer and were performing lesser duties under the same job title. The CO said the Employer failed to document either that it had in the past hired workers subject to the same terms and conditions as those required on its application for alien labor certification, or that a major business change required the creation of this position. Concluding from this and other inconsistencies that Employer failed to sustain its burden of proof that the job was a *bona fide* opening to which U. S. workers might successfully be referred, interviewed, and hired, the CO denied certification.

Appeal. Employer requested administrative-judicial review on March 31, 1997. AF 141-150. The Employer later filed a brief which traversed the reasons for rejection of the application for alien labor certification in the Final Determination, repeating and restating its Rebuttal arguments.[4]

Discussion

While an employer may adopt any qualifications it may fancy for the workers it hires in its business, the employer must comply with the Act and regulations when it seeks to apply such hiring criteria to U. S. job seekers in the course of testing the labor market in support of an application for alien labor certification. After examining the application, NOF, rebuttal, Final Determination and the appeal, the Panel agrees that the evidence of record supported the CO's finding that the Employer failed to sustain its burden of proving that the position it offered was a bona fide job opportunity to which U. S. workers could be referred, as above. **H. C. LaMarche Enterprises**, 87 INA 607(Oct. 27, 1988).

The facts of this case are consistent with the regulatory provision that an employer's use of unduly restrictive job requirements in the certification process must be rejected under 20 CFR § 656.21(b)(2), unless such requirements are adequately documented or otherwise explained as arising from business necessity. The job duties that Employer described in box 13 and its job title were similar to the DOT position description for a Horse Trainer in DOT No. 419.224-010. The DOT described in detail the steps that a trainer carries out in training horses, but the job clearly did not include the medical services Employer incorporated in the job by saying the worker was "Responsible for worming and inoculating horses." These facts are explicit on the face of the record, and have been considered with the admissions in the Employer's expert evidence that indicated these functions were the work of a veterinarian that could be done by someone else at a cost savings for the Employer.

Summary. Employer's rebuttal supported the inference that worming and inoculating horses and trimming their feet were functions that were performed by Employer's owner or by

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[4] To the extent that the Employer's brief has relied on assertions of prior employment as an undocumented worker in the United States to support arguments concerning the Alien's qualifications, such assumptions have been disregarded.

others in the past, which supported the finding that the Employer failed to prove that this job existed before it either "hired" or "promoted" the undocumented Alien to perform this work. Moreover, the Employer admitted that its workers in the position of Assistant Trainer had not performed in the past the job duties it described in the application. Employer did not suggest that this novel combination of the duties of a horse trainer and a veterinary medical technician was common to the industry or that a material change in its business or business necessity required it to innovate such a combination of duties. As the Appellate File lacks proof that this job opportunity clearly was open to U. S. workers under all the circumstances presented by this evidence, the Panel finds that the evidence supported the CO's denial of certification.[5]

Accordingly, the following order will enter.

Order

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

ALJ Lawson, DISSENTING

The majority predicates its decision on the finding that:

> Employer did not suggest that this novel combination of the duties of a horse trainer and a veterinary medical technician was common to the industry or that a material change in its business or business necessity required it to innovate such a combination of duties.

Employer's rebuttal stated that until recently he had only a few horses, usually about six, and was able to ride on his own, hire outside people to trim horses' feet, inoculate and work

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[5]The majority observes that even if the Employer sustained its burden of proof as to the existence of a material change in its business, it failed ot justify the proposed combination of duties, to prove that the Alien was qualified to perform the job offered, or that the job was a *bona fide* opening to which U. S. workers might successfully be referred, interviewed, and hired. The evidence did not document the business expansion that the Employer's statement asserted in the rebuttal. It is well-established that even though Employer's written assertion constitutes documentation, his bare assertion without supporting evidence is generally insufficient to carry an employer's burden of proof. **Gencorp**, 87-INA-659(Jan.13, 1988)(*en banc*); also see **Carl Joecks, Inc.**, 90-INA-406(Jan. 16, 1992).

horses and train colts or do it himself. However, he now has greatly expanded to 26 horses and needs an assistant trainer qualified to perform these tasks as it is now impractical to do it himself and extremely expensive to hire a veterinarian to worm and inoculate, which are a critical part of the job duties, as emphasized by employer and substantiated by an independent affidavit.(AF 99-100, 104) Employer has demonstrated both business necessity and material change warranting the combination of duties.

Under the circumstances, the FD should be reversed and the alien certified.

s/s James W. Lawson
JAMES W. LAWSON
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.